STATE OF MICHIGAN

COURT OF APPEALS

DENISE L. ANDRUS and PAUL K. ANDRUS, Plaintiffs-Appellees,	UNPUBLISHED May 19, 2011
v	No. 296417 Wayne Circuit Court
CITY OF SOUTHGATE, Defendant-Appellant.	LC No. 09-012394-NO

Before: BECKERING, P.J., and WHITBECK and M. J. KELLY, JJ.

PER CURIAM.

Defendant City of Southgate appeals as of right the trial court's January 27, 2010, order denying in part defendant's motion for summary disposition. The trial court held that genuine issues of material fact exist with regard to the applicability of the public building exception to governmental immunity. We affirm.

I. BACKGROUND FACTS AND PROCEDURAL HISTORY

Defendant owns and operates the Southgate Civic Center ("the center"), which houses an ice arena and various meeting rooms. At her deposition, plaintiff Denise L. Andrus testified that her granddaughter participates in the ice skating program at the center. On October 9, 2007, at approximately 4:00 p.m., Andrus drove to the center to watch skating practice, attend the monthly meeting for the program, and pick up candy to be sold in a fundraiser for the program.[1] The meeting was held in a banquet room located on the first floor near the back of the building. When the meeting concluded at approximately 8:30 p.m., boxes of candy bars were distributed to the attendees. Andrus took two boxes and headed to the emergency doors in the back of the banquet room. Andrus had parked her car in front of the building when she first arrived, but one of her daughters moved it to a parking space behind the building before the meeting.

Andrus followed her two adult daughters out the emergency doors. Andrus's friend Liz followed her. The doors opened onto a maintenance or service driveway. Dumpsters and a

[1] The parties refer to that night as "candy night."

generator were located just outside the doors on the driveway. That night, there were also four illegally parked cars on the driveway. There were three lights attached to the exterior of the building in the area of the driveway, but according to Andrus, the area was completely dark when she exited the building. She maneuvered around two cars and then walked along the length of another car, between the car and the left edge of the driveway. When Liz asked her a question, Andrus turned to respond and lost her footing. Her foot was positioned so that it was partially off the edge of the driveway. She twisted her ankle and fell into the grassy area beside the driveway, which was part of a drainage area for the building. [There is apparently a drop-off between the driveway and the grass, although it is not clear in the record how much of a drop-off it is.] The spot where Andrus fell was approximately 17.5 feet from the building. She hit her head, shoulder, and hip, and her hip and ankle were bruised and swollen after the fall. Andrus subsequently underwent rotator cuff surgery and had anchors placed in her shoulder.

Andrus and her husband, plaintiff Paul K. Andrus, filed a complaint against defendant on May 22, 2009. Andrus alleged that under the public building exception to governmental immunity, defendant violated its duty "to provide reasonably safe premises to persons lawfully on the property." She further alleged that she was unable to see the drop-off between the service driveway and adjacent grass because the area was completely dark. The lights attached to the exterior of the building were not illuminated, and according to Andrus, the lack of illumination was a defect of the building. Andrus's husband brought a loss of consortium claim.

Defendant subsequently moved for summary disposition under MCR 2.116(C)(7), (8), and (10), arguing that it had no pre-accident notice of any lighting malfunction and that the public building exception does not apply because "there was no defect 'of' the structure of the building, the location of the fall was not defective, the area where [Andrus] fell was too far from the building, . . . the rear entry to the Civic Center was not intended for general public use" and the exception "does not apply to a failure to maintain temporary conditions, negligent janitorial work, or improper designs of the buildings." Defendant further argued that the exception does not extend to loss of consortium claims.

At the hearing on defendant's motion for summary disposition, the trial court granted the motion with regard to the loss of consortium claim, [2] but denied the motion in regard to Andrus's claim that the public building exception applied to the facts of the case. The court held that the driveway was not a part of the building, but that the exterior lights were fixtures of the building and, therefore, that "the inadequacy of the operation of the lights could be a basis for the building exception" to apply. The court further held that there were material questions of fact with regard to whether defendant had actual or constructive knowledge of the alleged defect and whether the emergency doors were open to the public. The court subsequently issued an order granting in part and denying in part defendant's motion.

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[2] The loss of consortium claim is not at issue on appeal.

II. ANALYSIS

A. STANDARDS OF REVIEW

We review a trial court's decision on a motion for summary disposition de novo, viewing the evidence in the light most favorable to the nonmoving party. *Maiden v Rozwood*, 461 Mich 109, 118-120; 597 NW2d 817 (1999).

A motion for summary disposition under MCR 2.116(C)(8) tests the legal sufficiency of the complaint, while a motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Maiden*, 461 Mich at 119. Where a motion is brought under both MCR 2.116(C)(8) and (10), but the parties and the trial court relied on matters outside the pleadings, as is the case here, MCR 2.116(C)(10) is the appropriate basis for review. *Driver v Hanley (After Remand)*, 226 Mich App 558, 562; 575 NW2d 31 (1997). "The reviewing court should evaluate a motion for summary disposition under MCR 2.116(C)(10) by considering the substantively admissible evidence actually proffered in opposition to the motion." *Maiden*, 461 Mich at 121. If the evidence fails to establish a genuine issue of material fact, the moving party is entitled to judgment as a matter of law. *Id*. at 120.

MCR 2.116(C)(7) permits summary disposition where the claim is barred by immunity. *Maiden*, 461 Mich at 118. To survive a motion under MCR 2.116(C)(7), "the plaintiff must allege facts justifying the application of an exception to governmental immunity." *Fane v Detroit Library Comm*, 465 Mich 68, 74; 631 NW2d 678 (2001). The trial court must consider all admissible, documentary evidence submitted by the parties and accept all well-pleaded allegations as true, unless contradicted by documentation submitted by the opposing party. *Maiden*, 461 Mich at 119. A trial court's determination regarding the applicability of a statutory exception to governmental immunity involves a question of law subject to de novo review. See *Robinson v Lansing*, 282 Mich App 610, 613; 765 NW2d 25 (2009).

We review a trial court's decision to admit evidence for an abuse of discretion. *Craig v Oakwood Hosp*, 471 Mich 67, 76; 684 NW2d 296 (2004). An abuse of discretion occurs when the trial court chooses an outcome falling outside the range of principled outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). The "proponent of evidence bears the burden of establishing relevance and admissibility." *People v Crawford*, 458 Mich 376, 386 n 6; 582 NW2d 785 (1998).

B. PLAINTIFFS' UNSWORN LETTERS

Defendant argues that in denying its motion for summary disposition, the trial court improperly considered several unsworn letters submitted by plaintiffs. The letters, signed by skating club members and former city employees, state that members of the general public routinely use the emergency doors in the back of the banquet room to enter and exit the building, that skating club members have repeatedly complained to city employees about the lack of lighting near the emergency doors, and that the lack of lighting presents a safety risk. Defendant objected to the letters at the summary disposition hearing, arguing that they constituted inadmissible hearsay, but the trial court did not respond to the objection. We agree with defendant that the court improperly considered the unsworn letters.

Parties may submit "affidavits, depositions, admissions, or other documentary evidence" to support or oppose a motion under MCR 2.116(C)(7) or (10). MCR 2.116(G)(2), (3); see also MCR 2.116(G)(5). Such evidence can only be considered by the trial court "to the extent that the content or substance would be admissible as evidence to establish or deny the grounds stated in the motion." MCR 2.116(G)(6). "Opinions, conclusionary denials, unsworn averments, and inadmissible hearsay do not satisfy the court rule [MCR 2.116(C)(10)]; disputed fact (or the lack of it) must be established by admissible evidence." *SSC Assoc v Gen Retirement Sys of Detroit*, 192 Mich App 360, 364; 480 NW2d 275 (1991).

Here, the letters submitted by plaintiffs are signed, but unsworn, and constitute hearsay. Hearsay is a statement, such as a written assertion, "other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." MRE 801(a), (c). Pursuant to MRE 802, hearsay is generally inadmissible. Plaintiffs argue on appeal that the letters they submitted are admissible under the exception to the hearsay rule in MRE 803(24), which states:

> Other Exceptions. A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact, (B) the statement is more probative on the point for which it is offered than any other evidence that the proponent can procure through reasonable efforts, and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of the statement makes known to the adverse party, sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.

But plaintiffs have failed to establish that the letters are more probative on the point for which they were offered than any other evidence they could procure through reasonable efforts. There is no indication in the record that plaintiffs could not obtain affidavits or deposition testimony, both of which would have been admissible under MCR 2.116(G), from those that signed the letters. MRE 803(24) is, therefore, inapplicable, and plaintiffs do not assert that any other hearsay exception applies.

Accordingly, we hold that the trial court improperly considered the letters submitted by plaintiffs in denying defendant's motion for summary disposition. As will be explained further, however, the parties presented other evidence sufficient to uphold the trial court's denial of the motion.

C. THE PUBLIC BUILDING EXCEPTION

Defendant argues that the trial court erred in concluding that material questions of fact exist with regard to the applicability of the public building exception. We disagree.

The governmental tort liability act, MCL 691.1401 *et seq*., provides a broad grant of immunity from tort liability to government agencies, absent the applicability of a statutory exception, when they are engaged in the discharge or exercise of a governmental function. MCL 691.1407(1); *Maskery v Univ of Mich Bd of Regents*, 468 Mich 609, 613; 664 NW2d 165 (2003). MCL 691.1406 provides for the public building exception to governmental immunity. The purpose of this exception is to protect the general public from injury by imposing a duty on the government to repair and maintain buildings open to the public. *Bush v Oscoda Area Sch*, 405 Mich 716, 731-732; 275 NW2d 268 (1979); *Steele v Dep't of Corrections*, 215 Mich App 710, 713; 546 NW2d 725 (1996). At the same time, the exception is to be narrowly construed. *Horace v City of Pontiac*, 456 Mich 744, 749; 575 NW2d 762 (1998).

To prove the applicability of the public building exception, a plaintiff must demonstrate that (1) a governmental agency is involved, (2) the public building at issue is open for use by members of the public, (3) a dangerous or defective condition of the public building itself exists, (4) the governmental agency possessed actual or constructive knowledge of the alleged defect, and (5) the governmental agency failed to remedy the allegedly defective condition following a reasonable amount of time. MCL 691.1406; *Renny v Dep't of Transp*, 478 Mich 490, 495-496; 734 NW2d 518 (2007). In this case, there is no dispute that the center is run by a government agency and that portions of the center are used by the general public. At issue in this appeal is whether a defect of the building existed and whether defendant had actual or constructive knowledge of the defect, which it failed to timely remedy.

1. DANGEROUS OR DEFECTIVE CONDITION OF THE BUILDING

Plaintiffs' primary claim is that Andrus tripped and fell off of the service driveway because of a lack of lighting in the area. There is no dispute that the three lights attached to the exterior of the building were not illuminated at the time of her fall. Plaintiffs claim that if defendant had properly repaired or maintained the lighting system, the lights would have been illuminated. Andrus would have been able to see the drop-off between the service driveway and adjacent grassy area, and she would not have fallen. The trial court held that the lights were fixtures of the building and, therefore, that "the inadequacy of the operation of the lights could be a basis for the building exception" to apply.

Defendant argues that although the lights were not illuminated at the time of Andrus's fall, plaintiffs have presented no evidence establishing that the lights actually malfunctioned, and that their inadequate lighting claim is tantamount to a design defect claim. To avoid governmental immunity, a plaintiff must assert a claim that the defective or dangerous condition of the building was the result of a failure to repair or maintain, not a design defect. *Tellin v Forsyth Twp & West Branch Twp*, ___ Mich App ___; ____ NW2d ___; 2011 Mich App LEXIS 161, 10-11 (Docket No. 293590, issued January 25, 2011), citing *Renny*, 478 Mich at 502-503, 506-507. A design defect consists of a defective or dangerous condition inherent in the design itself such as its characteristics, functioning, and purpose, whereas a failure to repair or maintain consists of "something caused by extrinsic circumstances, such as a malfunction, deterioration, instability, or a fixture that is improperly secured or otherwise improperly constructed or installed." *Id*. at 18-19.

In plaintiffs' complaint, they assert that defendant breached its duty of care by "failing to provide adequate lighting" in the area where Andrus fell. Again, this alleged failure to provide adequate lighting could have been due to a failure to properly maintain or repair, or to a design defect in the lights or the timer controlling the lights. The statements in plaintiffs' complaint regarding adequate lighting could also be interpreted as claims that defendant should have installed more lights or a different type of lighting, or should have installed the lights in different places, which in our view, would best be categorized as design defect claims. Cf. *Renny*, 478 Mich at 496, 506 (categorizing the mere absence of gutters and downspouts on a rest area building, which allegedly permitted an unnatural and hazardous accumulation of snow and ice in front of the entranceway, as a design defect).

Defendant is correct that, to the extent plaintiffs' claims may be characterized as design defect claims, they are not actionable under the public building exception to governmental immunity. See *Tellin*, 2011 Mich App LEXIS 161, 10-11. Nonetheless, plaintiffs continue to claim that Andrus's injuries resulted from defendant's failure to properly repair and maintain the lighting system, and the parties have presented at least some admissible evidence in support of that claim. Lloyd Duclo, a maintenance employee for the city, stated in his affidavit that he was not aware that the lights by the service driveway were not working until after Andrus's accident. Duclo further stated, however: "When I did discuss the malfunction with [Mike] Thomas, the Maintenance Supervisor, he informed [me] he was aware of the malfunction, and had put in a work request earlier that week before her accident, but they had not yet been repaired." In a supplemental affidavit, Thomas stated, contrary to Duclo's assertion, that no one had advised him the lights were not working before the accident. Thomas further stated that within a day after the accident he "checked the lights and learned the timer needed replacing." He replaced the timer, but the final electrical wiring had to be performed by an electrician. The director of public services for the city stated in an affidavit that an electrician "made any necessary repairs and replacements of lights on all of the buildings, including those located in the back of the Civic Center," within two or three days after the accident. The electrician's invoice indicates the same, although it does not specify exactly what repairs and replacements were made. Considering this evidence, we conclude that there is at least some support in the record for plaintiffs' failure to maintain and repair claim.

Defendant is also correct that, to the extent plaintiffs' claims may be characterized as claims of a failure to administer or supervise employees, they are not actionable under the public building exception to governmental immunity. In their complaint, plaintiffs assert that defendant breached its duty to Andrus by failing to, among other things, create procedures for inspecting the premises, supervise inspections, and designate specific employees to make inspections, conduct maintenance, and warn the public of any defects. Such claims sound in negligence, and the public "building exception is not a negligence action." *Mosqueda v Macomb Co Youth Home*, 132 Mich App 462, 469-470; 349 NW2d 185 (1984) (holding that the plaintiff's claim that the defendant failed "to hire competent, careful and knowledgeable agents, servants and/or employees to maintain, inspect and repair its premises so as to render same in a reasonably safe condition" was insufficient to plead the public building exception to governmental immunity). The public building exception is to be narrowly interpreted and "is limited to dangers actually presented by the building itself." *Wade v Dep't of Corrections*, 439 Mich 158, 167-168; 483 NW2d 26 (1992). But, again, there is at least some evidence supporting plaintiffs' claim that the

lighting system near the service driveway was defective and that the defect resulted from defendant's failure to maintain and repair.

Defendant further argues that even if the lights near the service driveway were not illuminated due to a failure to maintain or repair, the lack of illumination in that area was not a defect "of" the building. Defendant points out that Andrus fell approximately 17.5 feet from the building, the lights were not designed to illuminate that area even when activated, and the area was not intended to be used by the public. We hold, however, that there are material questions of fact concerning the existence of a dangerous or defective condition of the building.

Defendant, citing *Horace*, 456 Mich 744 (1998), states that "at best, the inadequate lighting . . . is a dangerous condition outside the building that cannot, by definition, be a part 'of' the building." Defendant misstates the holding in *Horace*. In *Fane v Detroit Library Comm*, 465 Mich 68, 76-77; 631 NW2d 678 (2001), our Supreme Court explained and expounded upon its holding in *Horace*, stating:

> The issue in *Horace* was whether the public building exception applies to dangerous or defective conditions of areas outside and adjacent to entrances or exits of public buildings. *Horace*, 456 Mich at 746. The Court concluded that "the ground adjacent to a public building is [not] a public 'building,' statutorily speaking . . . ." *Id*. at 757. Thus, the core holding of *Horace* is that mere sidewalks and walkways are clearly outside the scope of the public building exception.
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> However, the Court added in a footnote that the decision is not an absolute bar to injuries occurring from defective or dangerous conditions located outside the four walls of a building. The footnote states:
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> > The dissent suggests that our opinion may cut off liability for injuries resulting from the collapse of an outside overhang on a public building, stairs leading up to or down from an elevated building entrance, an underground tunnel leading into a building, an attached external ramp or railing. While it is not necessary for us to resolve these hypothetical situations in the case at bar, we note that an outside overhang is a danger presented by a physical condition of a building itself and that some stairs may also fit the test we adopt today if they are truly part of the building itself. [456 Mich at 756-757 n.9.]
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> We are now asked to further clarify the extent to which something outside a building falls within the exception.
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> []
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> As an initial matter, we conclude that the Court of Appeals reading of *Horace* was overly broad. The appeals court decision mistakenly portrays *Horace* as stating a bright-line rule precluding liability for injuries occurring from dangerous or defective conditions of building parts outside an entrance or exit.

> By imposing an absolute bar on liability for injuries arising from something outside the four walls of a building, the opinion precludes the possibility that an external part might be "truly part of the building itself."
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> While such an interpretation would be warranted by the words "in a public building," the Legislature did not choose that phrase. Rather, it referred to injuries resulting from dangerous or defective conditions "of a public building," which implies that the conditions could pertain to parts of a building outside its walls. We presume that "of" rather than "in" was carefully chosen to reflect legislative intent. See *Reardon* . . . .
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> It is consistent with *Horace* and its treatment of the word "of" to consider the characteristics of the building and the item in question. If it must be determined whether the building possesses the item, surely the relative characteristics of both must be evaluated.

The *Fane* Court further explained that in cases where the alleged dangerous or defective condition is in an item of personal property "outside the four walls of a building" that has a possible existence apart from realty, a fixtures analysis may be used to determine whether the item is "of" the building. *Fane*, 465 Mich at 77-78. "Items which are found to be fixtures are considered to be part of the realty to which they are connected. The question whether an object is a fixture depends on the particular facts of each case and is to be determined by applying three factors." *Velmer v Baraga Area Schs*, 430 Mich 385, 394; 424 NW2d 770 (1988) (citations omitted). "An item is a fixture if (1) it is annexed to realty, (2) its adaptation or application to the realty is appropriate, and (3) it was intended as a permanent accession to the realty." *Fane*, 465 Mich at 78. Here, the trial court concluded, and defendant conceded at oral argument before this Court, that the three lights attached to the exterior of the building near the service driveway are fixtures. See also *Singerman v Municipal Serv Bureau*, 211 Mich App 678, 684; 536 NW2d 547 (1995), rev'd on other grounds 455 Mich 135 (1997) (stating that the overhead lights in an ice arena were "a series of permanent fixtures" and "should be considered an integral part of the public building"). As fixtures of the building, the lights, and by extension the timer controlling the lights, are "of" the building for purposes of the public building exception. Whether the lighting system was actually defective, and whether the defect resulted from defendant's failure to maintain and repair, presents a material question of fact.

In arguing that the lighting system cannot be considered a part of the building, defendant points out that Andrus fell approximately 17.5 feet from the building and that the lights were not designed to illuminate that area even when activated. Defendant references cases such as *Horace*, wherein the plaintiff tripped and fell in a hole or crack in a walkway 18 to 28 feet from a public building and the hole or crack in the walkway was not considered to be a defective

condition "of" the building. *Horace*, 456 Mich at 747, 757. But, in this case, it is the lighting system that is a part of the building, not an adjacent sidewalk or walkway.[3]

Defendant also asserts that the lighting system cannot be a part "of" the building because the area where Andrus fell was not intended to be used by the public. But the cases cited by defendant in support of this assertion, *Fane* and *O'Connell v Kellogg Comm College*, 244 Mich App 723; 625 NW2d 126 (2001), do not suggest that whether an area is intended for use by the public is necessarily relevant to determining whether the area, or the fixtures in the area, are part of a building.[4]

We affirm the trial court's conclusion that the lights around the service driveway, and by extension the timer controlling the lights, were fixtures of the building, and therefore, a part of the building for purposes of the public building exception. Material questions of fact exist as to whether the fixtures were defective and whether the alleged defect resulted from a failure to repair or maintain.

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[3] In our view, Andrus's distance from the building and the area the lights would have illuminated if they had been activated is relevant, not to whether the lighting system is a part "of" the building, but to whether Andrus's injury *resulted from* the allegedly defective or dangerous condition of the building. MCL 691.1406 states that "[g]overnmental agencies are liable for bodily injury and property damage resulting from a dangerous or defective condition of a public building." If, as defendant suggests, the area where Andrus fell would not have been illuminated *even if* the lights were activated, then it is arguable that her injury could not have resulted from the allegedly defective lighting system. Defendant points this Court to the photographs attached as exhibit 19 to its motion for summary disposition and the affidavit of Ron Jewell for the proposition that the lights do not illuminate the area of the fall even when activated. The affidavit states: " . . . I took the enclosed Photographs . . . , which show that, even if the lights were activated, they would not have illuminated the area where Plaintiff fell." Based on our review of the photographs, however, we are not convinced that had the lights been activated, they would not have illuminated, or at least faintly illuminated, the area of Andrus's fall at the time she fell. Moreover, defendant has not specifically argued, either before the trial court or now on appeal, that Andrus's injury could not have *resulted from* the allegedly defective lighting because of her distance from the lights and the area they illuminate when activated. Therefore, we decline to address the issue further.

[4] Even if the public's use of the area where Andrus fell was somehow relevant, material questions of fact exist as to whether the area was intended to be used by the public. Even absent the inadmissible letters submitted by plaintiffs, record evidence establishes that skating club members, caterers, and other service people were permitted, and even instructed, to use the emergency doors and driveway at various times throughout the year, including to carry in boxes of candy on "candy night," and that for the remainder of the year, defendant did nothing to stop the public from using the area. Therefore, while several of defendant's employees averred that the area was not intended for public use, the fact that the public routinely uses the area leaves the question whether the area was intended to be open to the public in dispute.

In addition to claiming that the absence of lighting in the area where Andrus fell was a defective condition of the building, plaintiffs alternatively claim that the "the 'drainage' system that channeled water to the area in such a fashion as to cause erosion of the ground immediately contiguous to the driveway" was a defective condition of the building. Plaintiffs first raised this claim, in a cursory fashion, in their response to defendant's motion for summary disposition. At the hearing on defendant's motion, plaintiffs made no reference to the drainage system as a defective condition. The trial court briefly stated: "As far as the driveway is concerned, I would say that it's not a part of the building." The court did not address whether the drainage system, which allegedly caused the soil beside the driveway to erode, was a defective condition of the building. On appeal, defendant argues that the driveway is not a part of the building and even if it was, there is nothing defective about the structure of the driveway. Plaintiffs simply reiterate the same cursory argument regarding the drainage system that they first raised in response to defendant's motion for summary disposition. They have not presented any evidence, other than their own blanket assertions, on which a trier of fact could conclude that the drainage system was a part of the building or that there was any kind of defect in the system. Therefore, given the cursory fashion of plaintiffs' argument and the lack of admissible, record evidence supporting their claim, we decline to address this alternative argument.

2. KNOWLEDGE OF THE DEFECT AND FAILURE TO TIMELY REMEDY

Defendant next argues that the trial court erred in finding that a question of fact exists concerning defendant's knowledge of the alleged defective condition and failure to remedy the condition within a reasonable amount of time. We agree with the trial court.

Either actual or constructive knowledge can be used to satisfy the knowledge requirement set forth in the public building exception to governmental immunity. MCL 691.1406; *Ali v Detroit*, 218 Mich App 581, 586; 554 NW2d 384 (1996). Constructive knowledge "is demonstrated by showing that the agency should have discovered the defect in the exercise of reasonable diligence." *Ali*, 218 Mich App at 586-587. Under MCL 691.1406, "[k]nowledge of the dangerous and defective condition of the public building and time to repair the same shall be conclusively presumed when such defect existed so as to be readily apparent to an ordinary observant person for a period of 90 days or longer before the injury took place."

Defendant has presented numerous affidavits from its employees stating that they were not aware of any lighting problems before Andrus's accident. On the other hand, plaintiffs assert that the lights outside the emergency doors had not worked in several years and that skating club members had repeatedly complained to defendant's employees about the lighting malfunction. But the only pieces of evidence supporting plaintiffs' assertion are the unsworn letters they submitted to the trial court, which were inadmissible and should not have been considered. That said, Duclo stated in his affidavit that Thomas had "informed [him that] he was aware of the [lighting] malfunction, and had put in a work request earlier that week *before* [Andrus's] accident, but they [the lights] had not yet been repaired." (Emphasis added). Two or three days after the accident, an electrician made repairs to the lighting system in the back of the center. While Thomas stated in his supplemental affidavit that he did know about any lighting malfunction until after the accident, there is at least some evidence, namely Duclo's affidavit, suggesting otherwise. Therefore, we must conclude that a material question of fact exists

concerning defendant's knowledge of the alleged defective condition and failure to remedy the condition within a reasonable amount of time.

Affirmed.

/s/ Jane M. Beckering
/s/ William C. Whitbeck
/s/ Michael J. Kelly